

**Testimony of**  
**Mr. David Solomon**  
**Chief, Enforcement Bureau**  
**Federal Communications Commission**

**Before**  
**House Energy and Commerce Committee**  
**Subcommittee on Telecommunications and the Internet**

**January 28, 2004**  
**10:30 a.m.**  
**2123 Rayburn House Office Building**  
**Washington, D.C.**

Good morning, Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss the Commission's enforcement of broadcast indecency restrictions.

Many Americans, particularly those of us with children, are increasingly concerned about the quality of broadcast television. Broadcasters have a unique responsibility to act in the public interest and, in particular, to air appropriate programming when children are likely to be in the audience. When broadcasters fail, the Commission stands ready to enforce its indecency rules.

Chairman Powell has been outspoken on this issue. He recently indicated that "this growing coarseness . . . is abhorrent and irresponsible. And it's irresponsible of our programmers to continue to try to push the envelope of a reasonable set of policies that tries to legitimately balance the interests of the First Amendment with the need to protect our kids."

Under Chairman Powell's leadership, the Commission has taken indecency enforcement very seriously. To that end, we have strengthened our indecency enforcement in several respects. Most prominently, the Commission has increased the dollar amount of indecency enforcement substantially. Including actions anticipated in the near future, during the past three years, this Commission will have proposed indecency enforcement actions that, in the aggregate, significantly exceed the amount proposed during the prior seven years combined under the prior two Commissions. In addition, the Chairman has supported a 10-fold increase in the maximum indecency forfeiture permitted by the Communications Act.

Each of the Commissioners has played an important role in our stepped-up indecency enforcement under Chairman Powell. Commissioner Copps has been out front in focusing on the importance of this critical issue. Commissioner Martin has successfully urged the Commission to count multiple indecent utterances within a program as multiple violations.

Commissioner Abernathy has been a leader in the development of the “FCC Parents’ Place” on our web site, which provides helpful information to parents on a host of family-related issues, including indecency. Commissioner Adelstein has also been a strong supporter of indecency enforcement.

Before I go into further detail about our indecency enforcement efforts, I will provide some brief background about the legal landscape.

### **Legal Background**

Section 1464 of the Criminal Code prohibits the broadcast of indecent language.<sup>1</sup> A subsequent statute and court decision established an indecency safe harbor from 10 p.m. to 6 a.m.<sup>2</sup> Thus, the Commission’s indecency enforcement is limited by law to the hours between 6 a.m. and 10 p.m., and our indecency rule incorporates this limitation.<sup>3</sup> The Commission has authority both to issue monetary forfeitures of up to \$27,500 for each indecency violation and to revoke broadcast licenses for indecency violations.<sup>4</sup>

The courts have held that, unlike obscene speech, indecent speech is protected by the First Amendment. The courts have upheld FCC regulation of broadcast indecency as a means to protect children. At the same time, the courts have warned the FCC to proceed cautiously in this area because of the important First Amendment rights at stake.<sup>5</sup>

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<sup>1</sup> 18 U.S.C. § 1464

<sup>2</sup> The Public Telecommunications Act of 1992, Pub. L. No. 356, 102d Cong., 2d Sess., 106 Stat. 949 (1992), and *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

<sup>3</sup> 47 C.F.R. § 73.3999.

<sup>4</sup> 47 U.S.C. §§ 312(a)(6); 503(b)(1)(D).

<sup>5</sup> See, e.g., *FCC v. Pacifica*, 438 U.S. 726, 761 n.4 (Powell, J. concurring) (“since the Commission may be expected to proceed cautiously, as it has in the past, I do not foresee any undue ‘chilling’ effect on broadcasters’ exercise of their rights”); *Action for Children’s Television*, 842 F. 2d at 1340 n. 14 (internal citations omitted) (“the potential

The Commission has defined indecency since the 1970s as follows: “Language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual and excretory activities or organs.”<sup>6</sup> The courts have affirmed this definition.<sup>7</sup>

In applying this definition, the Commission balances three key factors in order to determine whether, in context, the programming at issue is patently offensive: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for shock value.<sup>8</sup>

### **FCC Indecency Enforcement**

As previously noted, the Commission takes its indecency enforcement responsibilities very seriously. We have taken strong enforcement action in this area under Chairman Powell’s leadership and have stepped up our enforcement in significant ways. Here are some highlights:

*First*, including actions anticipated in the near future, since Chairman Powell took office in mid-January 2001, the Commission will have issued 18 proposed indecency forfeitures (so-called Notices of Apparent Liability), for a total of about \$1.4 million in proposed fines. This dollar amount significantly exceeds the total amount of about \$850,000 in indecency forfeitures proposed during the prior seven years under the two prior Commissions.

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chilling effect of the FCC’s general definition of indecency will be tempered by the Commission’s restrained enforcement policy”).

<sup>6</sup> *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (*Indecency Policy Statement*).

<sup>7</sup> See e.g., *Pacifica*; *Action for Children’s Television*.

<sup>8</sup> See *Indecency Policy Statement*.

*Second*, starting last year, the Commission has increased the amount of its proposed indecency forfeitures. Instead of routinely proposing forfeitures at the \$7,000 “base” amount provided in the Commission’s *Forfeiture Policy Statement*,<sup>9</sup> the Commission has begun proposing in appropriate cases forfeitures for the statutory maximum of \$27,500 per incident. Applying this stepped-up approach to enforcement, the Commission proposed an indecency forfeiture last year of over \$350,000 for multiple violations.<sup>10</sup> Another proposed forfeiture against one licensee of over \$700,000 for multiple violations is anticipated in the near future. This will be the highest single proposed forfeiture against a broadcaster for indecency or any other violation in the history of the Commission.

*Third*, last year, the Commission provided explicit notice to broadcasters that it may begin license revocation proceedings for serious indecency violations.<sup>11</sup> The Commission now reviews indecency cases with the possibility of revocation being a serious consideration.

*Fourth*, last year, the Commission also provided explicit notice to broadcasters that it may treat multiple indecent utterances within a single program as constituting multiple indecency violations, rather than following its traditional per program approach.<sup>12</sup> Again, the Commission now reviews indecency cases with this new approach in mind.

*Fifth*, also beginning last year, the Commission broadened its indecency investigations to cover not just the station that is the subject of a complaint but also co-owned stations that

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<sup>9</sup> *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, *recon. denied*, 15 FCC Rcd 303 (1997); 47 C.F.R. § 1.180(b)(4) Note.

<sup>10</sup> *Infinity Broadcasting Operations, Inc.*, FCC 03-234 (rel. Oct. 2, 2003).

<sup>11</sup> *Infinity Broadcasting Operations, Inc.*, 18 FCC Rcd 6915 (2003).

<sup>12</sup> *Id.*

broadcast the same potentially indecent material. The Commission also began collecting more extensive information from broadcasters in the course of our indecency investigations.

*Sixth*, the Chairman recently proposed that the Commission reverse the Enforcement Bureau's October 2003 ruling that the broadcast of a live statement by a Golden Globe award recipient that "this is really, really Fxxx-ing brilliant" was not indecent because it was used in a non-sexual context and was fleeting and isolated.<sup>13</sup> The Bureau made this decision based on precedent stating that the broadcast of a single expletive, including the "F-Word," was not indecent.<sup>14</sup> The Chairman has now proposed that the Commission conclude that the precedents underlying the Bureau decision are no longer good law. If the Commission agrees to this approach, and does depart from these prior precedents and reverse the Bureau decision that we based on those precedents, it would represent a significant strengthening of indecency enforcement. I can assure you that the Enforcement Bureau will be fully committed to enforcing the law in the manner set forth by the Commission in its decision.

*Seventh*, the Commission has been successful in collecting indecency forfeitures.

### **Conclusion**

We believe Congress can also assist us in our efforts to enforce the indecency restrictions in a strong and effective manner. In this regard, Chairman Powell has supported increasing by a factor of 10 the maximum statutory forfeiture amounts specified in the Communications Act

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<sup>13</sup> *Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globe Awards" Program*, DA 03-3045 (EB rel. Oct. 3, 2003).

<sup>14</sup> See, e.g., *Pacifica Foundation*, 2 FCC Rcd 2698, 2699 (1987) (subsequent history omitted) ("If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."); *Lincoln Dellar, Renewal of License for Stations KPRL(AM) and KDDB(FM)*, 8 FCC Rcd 2582, 2585 (MMB 1993) (live, fleeting use of the "F-Word" not indecent); *L.M. Communications of South Carolina, Inc.*, 7 FCC Rcd 1595 (MMB 1992) (live, fleeting use of a variant of the "F-Word" not indecent).

for indecency and we hope Congress will enact such legislation. We appreciate the leadership Chairman Upton has provided on this issue.

In sum, I want to assure the Subcommittee that the Commission is fully committed to vigorous enforcement of the broadcast indecency restrictions in order to protect the interests of America's children. We stand ready to work with you to attain this important public interest objective.

I would be happy to answer any questions you may have. Thank you.